United States District Court
Northern District of Indiana
South Bend Division

THE UNITED STATES OF AMERICA and DAVID R. HOFFMAN, Plaintiffs,	)	
v.	)	CASE NO: 3:12 CV 237
NATIONAL COLLEGE a/k/a NATIONAL COLLEGE OF KENTUCKY INC., and DOES 1 through 50, inclusive, Defendants.	)	

Realtor, David Hoffman's, Response to National College's Motion for Dismissal Pursuant to Federal Rule Civil Procedure 12b(6)

Defendant's Motion

Defendant, National College (National), has filed a Motion to Dismiss Realtor's (Mr. Hoffman) complaint pursuant to Rule 12 b(6), on grounds that Mr. Hoffman fails to state a recognizable claim and fails to comply with Rules 8(a) and 9(b) of the Federal Rules of Civil procedure. National argues that Mr. Hoffman fails to specify the "who, what, when, where and how" details of any fraudulent claims it has submitted to the government. National also argues that Mr. Hoffman has not specified which laws or regulations it has violated, or what information Mr. Hoffman may possess that would jeopardize National's accreditation.

Mr. Hoffman's Complaint

In his Complaint for Damages, Mr. Hoffman alleges in specific detail all facts and dates concerning National's efforts to make him sign an agreement which, absent his willingness to pay liquidated damages, would have required him to withhold negative but truthful information from National's students, prospective students, government lenders and accreditors. Mr.

Hoffman alleges that National fired him because of his refusal to sign the agreement and conditioned the continued employment of all of its faculty members on their willingness to sign this agreement. This agreement possesses all the elements of a binding contract.

Mr. Hoffman's Complaint for Damages further specifies that National's conduct violates specific accreditation criteria which require National to make its faculty members available for private meetings with accreditation teams during school visits. Mr. Hoffman alleges National knowingly violates accreditation rules and standards by intimidating and firing employees whom accreditors rely upon for information when deciding whether or not National should maintain its accreditation. Finally, Mr. Hoffman alleges that all colleges, including National, must be accredited in order to maintain eligibility for government funded student loans. Hoffman alleges that National has and continues to receive student loan money on the basis of an accreditation it maintains by flouting the fundamental tenants of the accreditation system.

Mr. Hoffman's Argument in Response to National's Motion

A. Overview

National admits in its 12b(6) motion that accreditation is a pre-requisite to its eligibility for receiving government funded student loans. In fact, the Department of Education relies heavily upon the accreditation system to determine institutional eligibility to participate in federally funded financial aid programs offered to students. National is accredited by the Accrediting Council for Independent Colleges and Schools (ACICS). ACICS has in place rules and procedures governing the manner in which it determines whether member schools should receive and maintain accreditation. In accordance with its own published rules and procedures, ACICS team members conduct periodic school visits at National's campuses. During these visits

ACICS requires that National "make provisions for adequate consultation between team members and the faculty, administrative staff, and students." *Policies, Procedures, and Standards Accrediting Council for Independent Colleges and Schools*, Rule 2-1-503. Based upon the information gathered from National's faculty and students, team members compile a comprehensive school evaluation report which is submitted to and relied upon by ACICS in its decision to continue or revoke National's accreditation.

National has flagrantly violated the ACICS requirement that it make provisions for "adequate consultation between team members and . . . faculty and students." By intimidating employees with a threat of a fine or termination for providing negative, yet truthful, information to ACICS, National intentionally prevents meaningful or "adequate" consultation between its faculty and ACICS team members. National's decision to force its faculty members to sign contracts binding them to conceal negative information from ACICS expressly violates ACICS accreditation criteria. ACICS maintains minimum eligibility criteria for schools seeking its accreditation. These criteria include a certification from each member institute that it shall be in compliance with all applicable laws and regulations. It is axiomatic that National violates Department of Education regulations which require accreditation when National maintains its accreditation by virtue of fraud and the intentional concealment of information from ACICS.

The False Claims Act cannot and does not allow a college to maintain its accreditation through deception and the intentional violation of procedures established by the school's accrediting agency in order to retain its eligibility to receive student loan money. If this were the case, then any accredited college could fire employees who refuse to conceal negative but truthful information from the school's accrediting body. The college could then, without consequence, continue to receive government loan money as a direct benefit of an accreditation obtained by fraud and collusion. This would encourage National and other similarly situated schools to knowingly conceal information in order to maintain federal student loan eligibility. Such a result would be absurd. So long as National continues to muzzle its faculty and educators from communicating truthfully with students, prospective students, ACICS and its team members, every application submitted by or for National College for a government funded student loan constitutes a false claim covered by the False Claims Act.

In a more traditional False Claims action, such as where a defendant directly overcharges the government for a good or service, the claim for payment is itself literally false or fraudulent. The False Claims Act, however, is not limited to such facially false or fraudulent claims for payment. See *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir.1996) Rather, the False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."*United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968). Furthermore, Congress amended the False Claims Act in 1986 and emphasized that the scope of “false or fraudulent claims” should be broadly construed:

> [E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.

S.Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274.

Mr. Hoffman’s claim is analogous to the claim brought by a Realtor in *United States v. Univ. of Phoenix*, 461 F.3d 1166, 2006(9th Cir. Cal. 2006). In that case, the Court determined that the False Claims Act applied to claims for student loans where Phoenix University was alleged to have falsely certified it was in compliance with an incentive compensation ban while intentionally and knowingly violating that requirement. The court found that Phoenix's false representations, coupled with later claims for payment of Title IV funds, constituted false claims under 31 U.S.C. § 3729(a)(1) & (a)(2). Mr. Hoffman complains that National knowingly causes its accrediting body to submit a false certification (accreditation)on its behalf by preventing its employees from sharing truthful information with the accreditor. National does this knowing ACICS's published regulations and procedures require it to make its employees available for interviews during accreditation visits. While intentionally violating this accreditation requirement, National has and continues to enjoy the profits generated by government loans.

In the *Phoenix* case, the Court surmised that the principles embodied in this broad construction of a "false or fraudulent claim" have given rise to two doctrines that attach potential False Claims Act liability to claims for payment that are not explicitly and/or independently false: (1) false certification; and (2) promissory fraud. Id. citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999).

False Certification

The Court first determined that Phoenix's conduct subjected the school to potential False Claims Act liability under the false certification doctrine. The Court noted that "[m]any different courts have held that a claim under the False Claims Act can be false where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment." *Phoenix*, 461 F.3d at 1171. citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999); *Mikes v. Straus*, 274 F.3d 687, 697-700 (2d Cir.2001); and *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir.2004). The Court emphasized that the word "certification" has no "talismanic significance" and that False Claims liability will attach where there is “fraud surrounding the efforts to obtain the contract or benefit status, or the payments thereunder." Id. quoting *Harrison*, 176 F.3d at 788. The Court went on to state:

> That the theory of liability is commonly called "false certification" is no indication that "certification" is being used with technical precision, or as a term of art; the theory could just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding" theory, but that is not as succinct. Furthermore, because the word "certification" does not appear in 31 U.S.C. § 3729(a)(1) or (a)(2), there is no sense in parsing it with the close attention typically attending an exercise in statutory interpretation. So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.

Based upon this sensible interpretation of the False Claims Act, a fraudulently maintained school accreditation is a type of certification covered by False Claims Act. Mr. Hoffman has set forth a sufficient claim by specifying National’s decision to maintain student loan eligibility status by forcing employees to sign contracts that bind them to conceal derogatory information if questioned by the school’s accreditors. National seems to argue that it cannot be liable under the False Claims Act because it is ACICS, rather than National, who submits and supplies the accreditation credentials that make government loans possible. In making this argument, National asks the Court to overlook the substance of its fraud. National should face False Claims liability for intentionally tricking ACICS into providing a false accreditation on its behalf no differently than if National made a false certification on its own.

Promissory Fraud

This theory holds that liability will attach to each claim submitted to the government under a contract when the contract or extension of government benefit is originally obtained through false statements or fraudulent conduct. *United States ex rel. Marcus v. Hess,* 317 U.S.

537, 542, 63 S.Ct. 379, 87 L.Ed. 443 (1943). In *Hess,* the Court found contractors liable under the False Claims Act for submitting claims under government contracts that the defendants obtained via fraud. *Id.* The Court determined that because the original contract was obtained via fraud, each claim submitted under the contracts constituted a false or fraudulent claim. *Id.* at 543, 63 S.Ct. 379. In other words, subsequent claims are false because of an original fraud. *Phoenix*, 461 F.3d at 1173. Under the Promissary Fraud theory, the Realtor need not prove that the defendant made a false certification at all.

The Seventh Circuit recently adopted a version of the promissory fraud theory. See *United States ex rel. Main v. Oakland City Univ.,* 426 F.3d 914 (7th Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006). Relators in *Main* alleged liability under the False Claims Act based on an Oakland City University representation that it would comply with the incentive compensation ban, despite its knowledge of the ban and intent not to comply. In finding False Claims Act liability, the Court held that the relators had stated a claim based upon allegations of fraud in the inducement of the original Program Participation Agreement. *See id.* Pursuant to the plain language of 31 U.S.C. § 3729(a)(2), the Court determined that False Claims Act liability was clear: "[t]he University `uses' its phase-one application (and the resulting certification of eligibility) when it makes (or `causes' a student to make or use) a phase-two application for payment. No more is required under the statute." *Id.*

Similarly, National promises students and the government that it is properly accredited. It maintains its accreditation and resultant student loan eligibility by intentionally violating accreditation procedures and then makes or causes students to make applications for loan money that it will ultimately receive. By virtue of falsely presenting itself as a properly accredited institution, and then receiving the associated benefit of student loan eligibility, National renders itself liable under the False Claims Act theory of Promissory Fraud.

Conclusion

Mr. Hoffman has specifically set forth facts alleging that National is maintaining its accreditation by threat of financial penalty or termination against faculty members whom ACICS relies upon for information needed to assess National's accreditation worthiness. In doing so, National flagrantly violates the published rules and procedures established by ACICS. Without accreditation, National would be unable to receive student loans funded by the government. If proven true, these facts would allow a finder of fact to determine that every student loan claim which National submits, or allows its students to submit, constitutes a false and fraudulent claim. Therefore, National's Motion to Dismiss should be denied.

Respectfully submitted,

s/ Jeffrey E. Kimmell

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2013 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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